LEGAL MEMORANDUM

A Constitutional Analysis of Proposed Copy Restrictions on Tobacco Product Advertising

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The analysis presented in this memorandum would apply to federal legislation discriminating against advertising for any product—not just legislation discriminating against tobacco product advertising

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In recent months, advocates of a complete ban on tobacco product advertising have focused attention on a proposal advanced by the American Cancer Society in March 1986 as a "first step" toward a complete ban.[1] The ACS proposal would permit tobacco product advertisements to include only a picture of the product package, the product's price, its "tar" and nicotine content, and one of the federally-required rotating warning messages. The ACS restrictions are designed to make tobacco product advertisements resemble financial announcements in the business pages of a newspaper.

We believe that the restrictions proposed by the ACS would be held to be unconstitutional. The ACS approach is, for all practical purposes, tantamount to a total ban on tobacco product advertising. Consumers are bombarded every day by distinctive commercials promoting a wide variety of products and services. Under the ACS proposal, tobacco product advertising would be rendered invisible, and advertisers of tobacco products would be unable to distinguish their brands from those of their competitors. Advertising that passes unnoticed amounts to no advertising at all.

Even if it were not considered tantamount to a flat ban, the proposed restrictions could not pass muster under the Supreme Court's test for restric-

[1] *See* ACS News Release, March 24, 1986.

tions on commercial speech. Under the test established in the *Central Hudson* case and reaffirmed in *Posadas*, proponents of these restrictions would be required to demonstrate that the ACS approach would "directly advance" a substantial governmental interest and that this interest could not be served by any "less restrictive" means. Proponents of the ACS approach could not meet this burden. Moreover, if adopted, the ACS approach would quickly spawn similar proposals to restrict advertising of other controversial products or services.

1. The Scope of the ACS Proposal

As noted above, the ACS favors the elimination of all tobacco product advertising and promotion and views its proposed restrictions as a "first step" to a complete ban. The restrictions on tobacco product advertising text would forbid the use of "all models and scenery" and limit illustrations to "depiction[s] of the cigarette packages." [2] Apart from displaying a picture of the brand's package, advertising copy could include only the "tar" and nicotine content of the brand, its price and one of the rotating warning messages required by federal law.[3] Under the ACS proposal, tobacco product manufacturers would be deprived of all of the means they now use (and that advertisers of other products could continue to use) to attract the public's attention to their message. Every effective avenue for brand differentiation would be foreclosed.

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[2] ACS News Release, March 24, 1986, p. 2.

[3] *See* Comprehensive Smoking Education Act, 15 U.S.C. § 1333(a); Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. § 4402(a).

2. The ACS Restrictions Would Be Equivalent to a Total Advertising Ban

Tobacco products have been manufactured and sold for hundreds of years. As such, they constitute a "mature" product whose availability and qualities are widely known to consumers. The function of advertising for such "mature" products is not to stimulate overall demand for the product category but to increase the market share of a particular brand at the expense of competing brands and to retain brand loyalty against other brands.

Successful brand promotion in a mature product market must overcome two hurdles. First, the advertising must attract the viewer's attention. Second, and equally important, the advertising must distinguish the advertised brand from the multitude of others on the market. In short, both the advertisement itself and the advertised brand must stand out from the crowd.

The pale commercial notices permitted under the ACS restrictions could accomplish neither objective. Consumers are exposed to countless advertisements each day in a variety of media, and advertisers constantly must struggle to break through the resulting "commercial clutter." [4] To break through the clutter,

[4] *See, e.g.*, "Eye-Tracking Research Bolsters Claims of Bus Shelter Advertising Effectiveness," *Marketing News*, Oct. 28, 1983, p. 8 (reporting research showing that "about 13% of magazine ads are totally missed by the reader, largely because of ad clutter"); Alter, "Research on Eye Movement Shows Editorial Environment *Does* Affect Ad Readership," *Magazine Age*, Oct. 1982, p. 42 (reporting research showing that "readers are totally ignoring 40% of advertised names"); Ogilvy & Raphaelson, "Research Advertising Techniques that

advertisers use eye-catching models in eye-catching settings, displaying bold graphic designs and arresting brand slogans. Through these devices the advertiser hopes to gain the consumer's momentary attention—and, with it, a chance to speak directly to the consumer.[5] The bland fare that would be permitted under the ACS proposal could not compete for con-

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Work—and Don't Work," *Harvard Business Review,* July-August 1982, p. 14 ("[s]ome 85% of magazine readers do not remember seeing the average advertisement"). According to George Gallup, "two advertised products in the same commodity group, using the same size space, can differ by as much as 12 to 1 in their ability to command attention and register brand name." Gallup, "How Advertising Works," 23 J. Advertising Res. 76, 78 (1983).

This phenomenon also is well documented in electronic-media advertising. *See, e.g.,* C. Cobb, "Television Clutter and Advertising Effectiveness," in *American Marketing Association Proceedings* (1985); P. Webb, "Consumer Initial Processing in Difficult Media Environment," *Journal of Consumer Research,* vol. 6, no. 4 (1979); M. Ray & P. Webb, "Experimental Research on the Effects of Television Clutter: Dealing with a Difficult Media Environment," in Marketing Science Institute, *Research Report* No. 76-102 (1976); P. Webb & M. Ray, "Effects of TV Clutter," *Journal of Advertising Research,* Vol. 9, no. 3 (1970).

[5] *See Advertising Tobacco Products: Hearings before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce,* 99th Cong., 2d Sess. 666-67, 670, 674-75 (1986) ("1986 Hearings") (statement of Dr. Scott Ward, Professor of Marketing, The Wharton School); *Advertising Tobacco Products: Hearings on H.R. 1272 and H.R. 1535 before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce,* 100th Cong., 1st Sess. (1987) ("July 1987 Hearings") (statement of Dr. Ward).

sumer attention with flashy and distinctive advertising for other products.[6]

These advertisements similarly would not be an effective means of brand differentiation. Individual cigarette brands usually are not readily distinguishable on the basis of objective characteristics.[7] Accordingly, a cigarette manufacturer must identify a distinct group of consumers who already smoke—and then promote his brand effectively *with that group*. As Professor Scott Ward has explained:

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[6] The point is not that tobacco products compete for consumer *dollars* with other product categories (such as soft drinks or deodorants), but that advertisements for tobacco products compete with other-product advertising for limited consumer *attention*. Visually effective advertisements for other products inevitably would crowd tobacco product advertisements out of the public mind if such advertisements were limited as the ACS has proposed.

[7] Two limited exceptions are differences in "tar" and nicotine content and price, which could be mentioned under the ACS proposal. (Other limited objective differences, such as the presence or absence of a filter, could not be mentioned under the ACS restrictions.) But these two exceptions can at best only partially distinguish certain brands. Moreover, of the two exceptions, only "tar" and nicotine content *would* be advertised if the ACS proposal were adopted. Even though price *could* be advertised under the ACS restrictions, variations from market to market often render price advertising unfeasible. In addition, the manufacturers of tobacco products —who are responsible for the bulk of the advertising at issue —do not set the retail price. And price competition in any event contributes less to the long-term success of a brand than "building the most favorable image, the most sharply defined *personality* for [the] brand." Phillips, "Can 'Commodity Thinking' Kill Established Brands?" *Adweek*, Dec. 8, 1986, p. 18 (emphasis in original).

> "An advertiser attempting to promote a brand that is not objectively distinguishable from other brands * * * aims to promote his brand with particular groups of consumers by saying, in effect, 'if you are this kind of consumer, Brand X is for you; if you are that kind of a consumer, Brand Y is for you.' The advertiser, in other words, chooses a particular consumer group at which to aim his message and tailors his message in a way that will strike a responsive chord with that group. People in our society cluster in 'taste cultures,' and it is at these groupings that advertisers direct their messages." *1986 Hearings*, *supra*, at 677 (citation omitted).[8]

In short, it is the consumer who shapes the advertisement—not the other way around. To reach particular consumer audiences, advertisers use models who match such pre-existing consumer categories as the "rough-and-ready" type, the "rich sophisticate," the "individualist," or the "social creature." Targeting particular brands for such distinct categories of the adult smoking market would be impossible under the ACS restrictions. Interbrand competition would be virtually eliminated.

Because visual technique plays such an important role in advertising, its use enjoys constitutional pro-

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[8] *See* P. Kotler, *Marketing Management* (5th ed. 1984); J. Engel, H. Fiorillo & M. Cayley, *Market Segmentation* (1972); D. Yankelovich, "New Criteria for Market Segmentation," *Harvard Business Review* (March-April 1964); J. Plummer, "Life Style Patterns: New Constraint for Mass Communication Research," *Journal of Broadcasting* (Winter 1971-1972); W. Smith, "Product Differentiation and Market Segmentation as Alternative Marketing Strategies," *Journal of Marketing* (July 1956); A. Roberts, "Applying the Strategy of Market Segmentation," *Business Horizons* (Fall 1961).

tection. In *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the Supreme Court stated that "[t]he use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly." *Id.* at 647. For this reason, the Court stated, "commercial illustrations are entitled to the First Amendment protections afforded verbal commercial speech: restrictions on the use of visual media of expression in advertising must survive scrutiny under the *Central Hudson* test." *Ibid.*[9]

Similarly, in *Bates* v. *State Bar*, 433 U.S. 350 (1977), the Court rejected the argument that attorneys could be limited to advertising their name and address in phone books: "[A]n advertising diet limited to such spartan fare would provide scant nourishment." *Id.* at 366-67. Even more basically, in *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60

[9] Using this analysis, the Court in *Zauderer* struck down a rule prohibiting illustrations in advertisements by attorneys. The Court rejected the argument that the government "may prohibit the use of pictures or illustrations in connection with advertising of any product or service simply on the strength of the general argument that the visual content of advertisements may, under some circumstances, be deceptive or manipulative * * *." 471 U.S. at 649. "[B]road prophylactic rules," it said, "may not be so lightly justified if the protections afforded commercial speech are to retain their force." *Ibid.* The Court added:

> "We are not persuaded that identifying deceptive or manipulative uses of visual media in advertising is so intrinsically burdensome that the State is entitled to forgo that task in favor of the more convenient but far more restrictive alternative of a blanket ban on the use of illustrations." *Ibid.*

(1983), the Court rejected an argument that advertisers could constitutionally be forced to wait for consumers to come to them; it recognized the right of sellers to use advertising tools that reach out and *effectively* communicate with potential purchasers. *See id.* at 69 n.18.[10] *See also Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57, 762 (1976).

The Court also has rejected arguments that restrictions on commercial speech may be justified by the availability of hypothetical alternative avenues of communication that would, in practice, be ineffective. In *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977), for example, the Court invalidated a prohibition on residential "For Sale" and "Sold" signs. The Court noted that, "[a]lthough in theory sellers remain free to employ a number of different alternatives, in practice * * * [t]he options to which sellers realistically are relegated" would be "less likely to reach persons not deliberately seeking sales information" and would be "less effective media for communicating the message." *Id.* at 93. Here, as in *Linmark*, the alternatives not foreclosed by the proposed restrictions "are far from satisfactory." *Ibid.*

In sum, the pseudo-advertising permitted under the ACS proposal would, in practice, be so ineffectual that it could not be considered a meaningful form of communication. The proposed restrictions thus would

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[10] In *Bolger*, the Court invalidated a ban on unsolicited mail advertisements for contraceptives. It rejected the argument that the ban was permissible because it left open the possibility of mailing advertisements to persons who affirmatively requested them.

be tantamount to an outright advertising ban. The visual images and textual messages that would be prohibited by the ACS controls not only are necessary to the effectiveness of tobacco product advertising; they are protected commercial speech under the First Amendment. As we now show, the ACS restrictions cannot be justified under the Court's commercial speech cases.[11]

3. The Invalidity of the ACS Restrictions

Since 1976, when it recognized that commercial speech is protected by the First Amendment, the Supreme Court has invalidated numerous content-based restrictions on truthful speech proposing lawful commercial transactions.[12] In no case since 1976,

[11] Commentators have suggested similar conclusions with respect to format restrictions on stock offerings or similar financial announcements. *E.g.*, Schoeman, "The First Amendment and Restrictions on Advertising of Securities under the Securities Act of 1933," 41 Bus. Law. 377 (1986); Lively, "Securities Regulation and Freedom of the Press: Toward a Marketplace of Ideas in the Marketplace of Investment," 60 Wash. L. Rev. 843 (1985); Note, "The Federal Securities Laws, the First Amendment, and Commercial Speech: A Call for Consistency," 59 Saint J. L. Rev. 57 (1984); Goodale, "The First Amendment and Securities Act: A Collision Course?", N.Y.L.J., April 8, 1983, at 1, col. 1. The Food and Drug Administration's regulation of product labeling also has been questioned on First Amendment grounds. *E.g.*, Fisher, "The Constitutionality of the Food and Drug Administration's Regulation of Over-the-Counter Drug Labeling under the Commercial Free Speech Doctrine," 40 Food Drug Cosm. L. J. 188 (1985); McNamara, "FDA Regulation of Labeling and the Developing Law of Commercial Free Speech," 37 Food Drug Cosm. L. J. 394 (1982).

[12] *See Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (price

including *Posadas*, has the Court "approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." *Central Hudson*, 447 U.S. at 566 n.9.

Commercial speech serves two fundamental values. First, our society does not tolerate government attempts to manipulate behavior by rationing information. Whether the speech is commercial or noncommercial, the First Amendment condemns paternalistic efforts by government to advance our welfare by keeping us in the dark. "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley* v. *Georgia*, 394 U.S. 557, 565 (1969).[18]

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advertising by pharmacists); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977) (residential "For Sale" and "Sold" signs); *Carey* v. *Population Services International*, 431 U.S. 678 (1977) (advertising and display of contraceptives); *Bates* v. *State Bar*, 433 U.S. 350 (1977) (advertising by lawyers); *Central Hudson Gas & Electric Corp.* v. *PSC*, 447 U.S. 557 (1980) (advertising by electric utilities); *In re R.M.J.*, 455 U.S. 191 (1982) (advertising by lawyers); *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (unsolicited mail advertisements for contraceptives); *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (advertising by lawyers). *Cf. Friedman* v. *Rogers*, 440 U.S. 1 (1979) (upholding statute prohibiting use of trade names by optometrists; trade names had been shown to be deceptive and served no communicative purpose); *City of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding content-neutral ordinance prohibiting posting of signs on utility poles).

[18] *See also, e.g., Virginia State Board of Pharmacy*, 425 U.S. at 770 ("It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its

Second, in addition to advancing this political value, commercial speech furthers economic objectives. It "inform[s] the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." [14] The Supreme Court has stated that "the free flow of commercial information is indispensable" to our "predominantly free enterprise economy." [15]

In order to protect these core values, the Court in *Central Hudson* adopted a stringent four-part test for scrutinizing restrictions on commercial speech:

> "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." 447 U.S. at 566.

Assuming for purposes of this discussion (and only for purposes of this discussion) that the ACS approach is meant to serve a substantial governmental interest, the ACS approach is invalid under the *Central Hudson* test because (as the Court specifically held in *Zauderer*) the speech in question is

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misuse if it is freely available, that the First Amendment makes for us.").

[14] *Bates*, 443 U.S. at 364.

[15] *Virginia State Board of Pharmacy*, 425 U.S. at 765.

protected; the restrictions at issue are unlikely to achieve their stated purpose; and the restrictions are more restrictive than necessary.[16]

(a) ***The ACS Restrictions Would Prohibit Protected Speech***

Tobacco advertising plainly concerns a lawful activity (unlike, for example, casino gambling or prostitution, which in most jurisdictions is unlawful). By the same token, tobacco product advertising—and, in particular, the images and messages that would be prohibited by the ACS restrictions—is not inherently misleading. Portraying attractive people as smokers is not misleading—many such people *do* smoke. And portraying smoking a particular brand as pleasurable is not misleading—smoking *is* pleasurable for people who smoke.

The Supreme Court and lower federal courts have consistently rejected arguments that advertising may be restricted because the public is so naive that it might be misled by the stock-in-trade of Madison Avenue. In *Bates*, for example, the Court refused to accept the proposition that the public "is not sophisticated enough to realize the limitations of adver-

[16] The ACS restrictions cannot possibly be justified as permissible time, place or manner restrictions. Such restrictions must "leave open ample alternative channels for communication" (*Virginia State Board of Pharmacy*, 425 U.S. at 771), and "may not be based upon either the content or subject matter of speech." *Consolidated Edison Co.* v. *PSC*, 447 U.S. 530, 536 (1980) (footnote omitted). The ACS proposal would satisfy neither requirement. It would render tobacco product advertising utterly ineffective, and the approach would apply only to tobacco product advertising rather than to all advertising on a content-neutral basis.

tising." 433 U.S. at 374-75. Similarly, in *Zauderer* the Court described the argument that illustrations may have a misleading subconscious effect on the viewer as based on "little more than unsupported assertions." 471 U.S. at 648.

In *Dunagin* v. *City of Oxford*, 718 F.2d 738 (5th Cir.) (en banc), *cert. denied*, 467 U.S. 1259 (1984), a federal court of appeals squarely rejected the argument that advertisements identifying alcohol beverages with the "good life" are misleading:

> "Nearly all advertising associates the promoted product with a positive or alluring lifestyle or famous or beautiful people. Our policy is to leave it to the public to cope for themselves with Madison Avenue panache and hard sells." 718 F.2d at 743.

Similarly, in *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds*, 467 U.S. 691 (1984), another federal court of appeals noted that almost all advertising tends to "project an image of [those who buy the advertised product] as successful, fun-loving people." 699 F.2d at 500 n.9. But the court held that such advertising is not on this account inherently misleading and thereby deprived of First Amendment protection. *Ibid.* The same conclusion follows with respect to advertising for tobacco products.[17]

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[17] The court in *Dunagin* also explained that the mere fact that certain advertising may not be acceptable for children cannot justify restrictions on advertising directed to adults. 718 F.2d at 743. In reaching this conclusion, the court of appeals relied on the Supreme Court's decision in *Youngs Drug Products*, where the Court stated that "the government may not 'reduce the adult population * * * to reading only what is fit for children.'" 463 U.S. at 73 (quoting *Butler* v.

It is plain, then, that the visual components of current tobacco product advertising—from bold abstract designs and vivid slogans to attractive models in attractive settings—cannot be considered inherently misleading. Because the ACS approach would prohibit protected speech, it must survive scrutiny under the last two prongs of the *Central Hudson* test. It cannot do so.

(b) *The ACS Restrictions Would Not Reduce Demand for Tobacco Products*

The proposed ACS restrictions would not "directly advance" the asserted governmental interest—to curtail the use of tobacco products. The Supreme Court carefully scrutinizes the asserted link between restrictions on commercial speech and the proffered governmental interests, and in the past it typically has found that link wanting.[18] Far from deferring to legislative determinations in this area, courts "review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy." [19]

Michigan, 352 U.S. 380, 383 (1957) (invalidating a statute that prohibited reading materials deemed inappropriate for children)). *See also Advertising of Tobacco Products: Hearing before the Subcomm. on Transportation, Tourism and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess., Tr. 150-52 (1987) ("April 1987 Hearing") (testimony of Professor Burt Neuborne, New York University Law School).

[18] *E.g., Linmark*, 431 U.S. at 565 n.7 (no "definite connection" between restrictions and governmental interest had been shown); *Bolger*, 463 U.S. at 73.

[19] *Central Hudson*, 444 U.S. at 566 n.9; *see also, e.g., City of Los Angeles* v. *Preferred Communications, Inc.*, 106 S. Ct. 2034, 2038 (1986).

The available evidence demonstrates that restrictions on tobacco product advertising do not reduce demand for tobacco products. As noted, such advertising is not intended to, and does not, persuade nonsmokers to smoke. Instead, it promotes interbrand competition for persons who have decided for other reasons to become smokers. The ACS proposals thus would interfere gratuitously with competition, without significantly affecting the number of smokers or their demand for tobacco products.[20] As Judge Skelly Wright stated in 1971: "While cigarette advertising is apparently quite effective in inducing brand loyalty, it seems to have little impact on whether people in fact smoke." [21]

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[20] *See* J. Hamilton, "The Demand for Cigarettes: Advertising, the Health Scare, and the Cigarette Advertising Ban," *The Review of Economics and Statistics,* vol. 54, at 401-411 (1972); R. Schmalensee, *The Economics of Advertising* (1972); L. Schneider, B. Klein & K. Murphy, "Governmental Regulation of Cigarette Health Information," *The Journal of Law and Economics,* vol. 29, at 575-612 (1981); B. Baltagi & D. Levin, "Estimating Dynamic Demand for Cigarettes Using Panel Data: The Effects of Bootlegging, Taxation and Advertising Reconsidered," *The Review of Economics and Statistics,* at 148-155 (1986); M. Waterson, *Advertising and Cigarette Consumption* (1983).

[21] *Capital Broadcasting Co.* v. *Mitchell,* 333 F. Supp. 582, 588 (D.D.C. 1971) (three-judge court) (dissenting opinion), *aff'd mem.,* 405 U.S. 1000 (1972). The Surgeon General agreed in 1979, stating that "the major action of cigarette advertising now seems to be to shift brand preferences, to alter market share for a particular brand." *Smoking & Health: A Report of the Surgeon General* 18-23 (1979). Even Michael Pertschuk, long an advocate of severe cigarette advertising restrictions, told a Harvard seminar in 1983 that "no one really pretends that advertising is a major deter-

The ACS proposal apparently is prompted by a concern that attractive visual imagery is an important factor in children deciding to smoke. Again, the evidence is directly to the contrary. As the director of NIH's National Institute of Child Health and Human Development testified in 1983, "[t]he most forceful determinants of smoking [by young people] are parents, peers, and older siblings." [22] This is con-

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minant of smoking in this country or any other." Tobacco Issues, Institute of Politics, Harvard University, April 27, 1983, Tr. 8-9. *See also* M. Waterson, *Advertising and Cigarette Consumption* 12-14 (1983).

Extensive testimony to the same effect has been presented in Congressional hearings. *See 1986 Hearings, supra,* at 640, 708, 666, 811 (statements of Dr. J.J. Boddewyn, Dr. Roger D. Blackwell, Dr. Scott Ward, and Michael J. Waterson); *April 1987 Hearing, supra* (statement of Howard H. Bell, President, American Advertising Federation); *July 1987 Hearings, supra* (statements of Dr. Ward, Mr. Waterson, and Dr. Boddewyn).

In its 1987 Annual Report to the President, the Council of Economic Advisors stated:

> "There is little evidence that advertising results in additional smoking. As with many products, advertising mainly shifts consumers among brands." *Economic Report of the President* 186 (1987).

Elizabeth Whelan of the American Council on Science and Health—an outspoken opponent of the tobacco industry—likewise has stated that an advertising ban would "probably not" reduce cigarette consumption in this country. Whelan, "Second Thoughts on a Cigarette-Ad Ban," *Wall St. J.*, Dec. 18, 1985, at 28, col. 6.

[22] *Smoking Prevention Education Act: Hearings on H.R. 1824 before the Subcomm. on Health and Environment of the House Comm. on Energy and Commerce,* 98th Cong., 1st Sess. 53 (1983) (testimony of Dr. Mortimer B. Lipsett). *See also* S. Ward, D. Wackman & E. Wartella, *How Children Learn To Buy* (1979); *1986 Hearings, supra,* at 682-83 (statement of

firmed by statistical research demonstrating that children's attitudes towards smoking are developed primarily through their experiences with parents, other family members, and peers.[23]

The evidence also shows that the attractive images displayed in tobacco product advertising are not accepted by youngsters as representing typical smokers. Rather, children view the stereotypical smoker as less educationally successful, less healthy and "tougher" than the stereotypical nonsmoker.[24] In short, children report a distinct image of "the smoker," but it is hardly the flattering one that anti-tobacco advocates attribute to advertising. Children are more likely to smoke when their own self-image

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Dr. Ward); *July 1987 Hearings, supra* (statement of Dr. Ward).

[23] *See, e.g.*, A. McAlister, J. Krosnick & M. Milburn, "Causes of Adolescent Cigarette Smoking: Tests of a Structural Equation Model," 47 *Social Psychology Quarterly*, 24-36 (1984); B. Flay, J. d'Avernas, J. Best, M. Kersell & K. Ryan, "Cigarette Smoking: Why Young People Do It and Ways of Preventing It," in *Pediatric Behavioral Medicine* (P. Firestone *et al.* eds. 1983); B. Bewley, J. Bland & R. Harris, "Factors Associated with the Starting of Cigarette Smoking by Primary School Children," 28 *British Journal of Preventive and Social Medicine*, 37-44 (1974).

[24] *See, e.g., 1986 Hearings, supra*, at 712-16 (statement of Dr. Roger D. Blackwell, Professor of Marketing, Ohio State University); L. Chassin, C. Presson, S. Sherman, E. Corty & R. Olshavsky, "Self-images and Cigarette Smoking in Adolescence," 7 *Personality and Social Psychology Bulletin*, 670-76 (1981); A. McKennell & J. Bynner, "Self-image and Smoking Behavior Among School Boys," 39 *British Journal of Educational Psychology*, 27-39 (1969); J. Barton, L. Chassin, C. Presson & S. Sherman, "Social Image Factors as Motivators of Smoking Initiation in Early and Middle Adolescence," 53 *Child Development*, at 1499-1511 (1982).

corresponds to the largely negative stereotypical image that they have of smokers [25]—a factor that certainly cannot be traced to tobacco product advertising in general or to its supposedly seductive models, scenery or other content.

Evidence from other countries that have implemented partial or complete bans on tobacco product advertising further confirms that the ACS proposal would not achieve its intended purpose. The consumption of tobacco products actually has increased in most countries in which advertising has been banned.[26] Moreover, a recent international survey

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[25] *See, e.g., 1986 Hearings, supra,* at 712-16 (statement of Dr. Blackwell) ; L. Chassin *et al.,* "Self-images and Cigarette Smoking in Adolescence," *supra*; J. Barton *et al.,* "Social Image Factors as Motivators of Smoking Initiation in Early and Middle Adolescence," *supra.*

[26] Waterson, *supra,* at 17-18; Int'l Advertising Ass'n, *Tobacco Advertising Bans and Consumption in 16 Countries* (J. Boddewyn 2d ed. 1986) ; *July 1987 Hearings, supra* (statement of Dr. Boddewyn). Noting this fact, FTC Chairman Daniel Oliver has testified in Congress that an advertising ban is unlikely to reduce tobacco consumption. *April 1987 Hearing, supra,* Tr. 15-16. *See also* "FTC Chief Opposes Ad Limits," *Advertising Age,* Nov. 17, 1986, p. 103 (interview with Chairman Oliver). *Economic Report of the President, supra,* 186 ("Evidence from other countries suggests that banning tobacco advertising has not discouraged smoking.").

Proponents of tobacco product advertising restrictions claim that in both Norway and Sweden there are fewer persons using tobacco now than when those countries allowed tobacco products to be advertised. But the incidence of smoking among adults overall had begun to decline in Norway *before* advertising was banned in 1975, and stabilized *after* the ban was imposed. In Sweden, cigarette advertising has not been completely banned, and in any event the incidence of smoking among adults also had begun to decline before special restric-

demonstrates that the incidence of smoking among young people bears no relation to the extent of advertising restrictions in the particular country.[27] In Sweden, the prevalence of smoking among 16-year-old males, and among all 13-year-olds generally, *increased* between 1980 and 1982, following the imposition of special advertising restrictions in 1979.[28]

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tions were imposed in 1979. As in Norway, the decline in smoking among adults in Sweden was more pronounced before the special advertising restrictions were imposed than afterward. *Tobacco Advertising Bans, supra,* at 22, 28. In 1984, nine years after the advertising ban was imposed in Norway, the proportion of all adult smokers in that country (42 percent) was still more than *one-third higher* than the proportion of all adult smokers in the United States (about 31 percent).

[27] Int'l Advertising Ass'n, *Why Do Juveniles Start Smoking?* (J. Boddewyn ed. 1986). In Norway, for example, 11 years after a total advertising ban was imposed, the proportion of 7-15 year-olds who smoke regularly (13 percent) was nearly *twice* as high as in Spain (7 percent), where only minor advertising restrictions were in effect, and more than *four times* as high as in Hong Kong (3 percent), where no advertising controls existed. *Id.* at 9. In Norway, 36 percent of all 15 year-olds smoked in 1986, while in Spain the figure was 27 percent and in Hong Kong the figure was 11 percent. *Id.* at 11. *See 1986 Hearings, supra,* at 642-43 (statement of Dr. Boddewyn); *July 1987 Hearings, supra* (statement of Dr. Boddewyn).

[28] Swedish National Smoking and Health Association, *Smoking Controls in Sweden* 11 (1983). Smoking among 16-year-old males had been declining sharply in the years preceding the ban—from above 40 percent in 1971 to 20 percent in 1979. For 16-year-old females, the prevalence of smoking declined more steeply *before* the special advertising restrictions were imposed in 1979 (from 47 percent in 1971 to 33 percent in 1979) than afterward (from 33 percent in 1979 to 31 percent in 1982). *Ibid.*

For all these reasons, the ACS restrictions could not meet the *Central Hudson* requirement of directly advancing a legitimate governmental interest.

(c) *The ACS Proposal Would Not Satisfy the Least Restrictive Alternative Requirement*

The ACS proposal also would not satisfy the fourth element of the *Central Hudson* test—that it be the least restrictive alternative for achieving the government's interest. First, when concerns about commercial speech arise, the preferred approach is to assure that more information is available—not less.[29] Second, as explained above, the ACS proposal is functionally equivalent to an outright ban on all tobacco product advertising, the broadest possible prohibition. As such, the proposal would prompt the most searching scrutiny for available alternatives. Even if the ACS approach were not considered to be tantamount to an outright ban, the issue is not whether the ACS proposal is less restrictive than some *other* prohibition, but whether it is the *least* restrictive means of achieving the asserted governmental purpose.[30]

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[29] *See, e.g., Bates,* 433 U.S. at 375 ("the preferred remedy is more disclosure, rather than less"); *Whitney* v. *California,* 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("the fitting remedy for evil counsels is good ones"). Federal legislation already requires cigarette and smokeless tobacco advertising to carry health messages, and it also directs the Secretary of Health and Human Services to establish and carry out a broad program to educate the public with respect to "any dangers to human health presented by cigarette smoking." Comprehensive Smoking Education Act, 15 U.S.C. § 1341(a); Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. § 4401(a).

[30] The ACS also has suggested that tobacco manufacturers be prohibited from engaging in other forms of speech, includ-

4. The *Posadas* Decision

As already demonstrated, the ACS restrictions on advertising and other speech would most likely be found unconstitutional under *Central Hudson* and the Supreme Court's other commercial speech cases. For a number of reasons, it is improbable that the Court's 5-4 decision in *Posadas* v. *Tourism Company of Puerto Rico*, 106 S. Ct. 2968 (1986), would provide a basis for sustaining the proposed restrictions.

First, the majority in *Posadas* undoubtedly was influenced by Puerto Rico's delicate relationship with

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ing sponsorship of cultural events and athletic contests under the brand name of a tobacco product. That any prohibitions of such speech would likely be considered unconstitutional under *Central Hudson* follows directly from the discussion above of the ACS proposal. Proponents of these restrictions have not and could not adduce convincing evidence demonstrating that associating a tobacco product brand with cultural, sporting or other events causes anyone—young persons in particular—to become smokers. Thus, the complaint would seem to be primarily that sponsorship and other such speech "may lend the tobacco industry an image of 'wholesomeness.'" K. Warner, *Selling Smoke* 54 (1986).

This concern, however, can hardly serve as a legitimate basis for restrictions on speech. In *Bates*, for example, the Court refused to accept the argument that advertising would "tarnish the dignified public image of the [legal] profession" as a ground for restricting commercial speech by lawyers. 433 U.S. at 368. *See also Virginia State Board of Pharmacy*, 425 U.S. at 766-70 (rejecting similar argument with respect to pharmacists). The concept of banning advertising of a lawful product to express official disapproval represents a frightening form of commercial "blacklisting." Moreover, if banning advertising of disapproved products is undertaken to make tobacco products seem illicit, such an approach surely would make tobacco products more attractive to youngsters, not less so.

the United States, its "unique cultural and legal history" (106 S. Ct. at 2976 n.6), and the economic development concerns that prompted the legislation at issue. Those factors are not present with respect to federal restrictions on tobacco product advertising and would play no part in a decision on the constitutionality of such restrictions.

Second, casino gambling historically has been illegal in most of the United States and is subject to severe, and obviously constitutional, restrictions in Puerto Rico. By contrast, tobacco products are legal throughout the United States. Four Justices have clearly stated their view that truthful advertising of legal products cannot be subjected to a blanket prohibition.[31] A majority of the Court has never held to the contrary.

Third, the restrictions considered in *Posadas* had little substantive effect because they did not actually forbid casino-gambling advertisements in any medium. Thus, they did not have the effect of manipulating behavior by keeping persons in ignorance. The proposed tobacco restrictions, by contrast, would seriously if not completely prevent persons from obtaining information on tobacco products. They would therefore prompt more searching scrutiny than the restrictions in *Posadas*.

Fourth, no one claimed in *Posadas* that casinos use advertising simply to attract customers from other

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[31] *See Central Hudson*, 447 U.S. at 573-79 (Blackmun, J., joined by Brennan, J., concurring in the judgment) ; *id.* at 581 (Stevens, J., joined by Brennan, J., concurring in the judgment) ; *Posadas*, 106 S. Ct. at 2981-92 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting).

casinos and to retain the loyalty of their own patrons. Nor did anyone show that the advertising restrictions would *not* reduce demand. Thus, the Court reasonably could have assumed that the restrictions on casino-gambling advertising were expected to reduce total demand. Here, by contrast, tobacco product advertising promotes interbrand competition for tobacco products without increasing total demand. There is therefore little reason for the Court to assume, or to defer to a legislative assumption, that restricting tobacco product advertising would in fact reduce overall demand for tobacco products.

Finally, taking the *Posadas* dicta to their logical limit would require overruling virtually all of the Court's prior commercial speech cases and would greatly expand governmental powers over what are now protected communications. The narrow majority in *Posadas* did not purport to overrule the Court's prior case law and understanding of the First Amendment. To the contrary, it expressly reaffirmed the *Central Hudson* test (106 S. Ct. at 2976).

Absent a clear statement from the Court that *Central Hudson* is no longer good law, the majority opinion in *Posadas* must be viewed in the sensitive and special context presented by Puerto Rico's casino-gambling advertising restrictions. As Justice Rehnquist himself stated in an analogous context:

> "Since the Court saves harmless from its present opinion our prior cases in this area, * * * it may be fairly inferred that it does not intend the results which might otherwise come from a literal reading of its opinion." *Bigelow*, 421 U.S. at 836 (dissenting opinion).

For all these reasons, it is likely that *Posadas* ultimately will be confined to its special facts. Under the Court's established commercial speech case law, we believe that the ACS proposal would be found to be unconstitutional because it would not directly advance a legitimate governmental interest or do so in the least restrictive way.

COVINGTON & BURLING